

CLERK'S COPY.

## TRANSCRIPT OF RECORD

---

---

Supreme Court of the United States

OCTOBER TERM, 1946-47

No. 93136

---

MARGARET E. SHERRER, PETITIONER,

vs.

EDWARD C. SHERRER

---

ON WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY  
OF BERKSHIRE, COMMONWEALTH OF MASSACHUSETTS

---

---

PETITION FOR CERTIORARI FILED JANUARY 22, 1947.

CERTIORARI GRANTED MARCH 3, 1947.

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1946

No.

MARGARET E. SHERRER, PETITIONER,

vs.

EDWARD C. SHERRER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME  
JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

INDEX

	Original	Print
Record from Probate Court of Berkshire County, Massachusetts	1	1
Register's certificate (omitted in printing)	A	1
Petition to establish desertion	2	1
Citation	3	2
Judgment	4	2
Answer	5	3
Request that testimony be reported	6	4
Appointment of Commissioner	7	4
Request for report of material facts	8	4
Appeal	9	5
Request for transmission of record to Supreme Judicial Court	10	5
Statement of evidence	11	6
Appearances	11	6
Testimony of Edward C. Sherrer	12	6
Margaret E. Phelps	20	14
Henry A. Phelps	43	37
Edward C. Sherrer (recalled)	49	43
Beverly Jean Sherrer	54	48
Motion to dispense with reproducing exhibits	59	52
Report of material facts	60	52
Certificate of Court regarding presentation of exhibits to full court	65	56
Stipulation as to names of parties	67	57
Proceedings in Supreme Judicial Court of Massachusetts	68	57
Rescript	68	57
Opinion, Wilkins, J.	69	58
Order allowing certiorari	78	65



[fol. 1] Register's Certificate to following transcript  
Omitted in Printing.

[fol. 2]

## IN THE PROBATE COURT OF BERKSHIRE COUNTY

### PETITION TO ESTABLISH DESERTION

To the Honorable the Judge of the Probate Court in and for the County of Berkshire:

Respectfully represents Edward C. Sherrer of Monterey in the County of Berkshire that he is the lawful husband of Margaret E. Sherrer of said Monterey that his said wife has deserted him, and that your petitioner, for justifiable cause, is actually living apart from his said wife and he herein sets forth the following specifications:

That the said Margaret E. Sherrer on the 14th day of November, 1944 in order to evade the laws of the Commonwealth of Massachusetts, obtained an invalid divorce in the state of Florida, and thereafter entered into a void marriage in the said state of Florida with one Henry Phelps of said Monterey; that said divorce and subsequent marriage are invalid, illegal and void. That there has been born to them the following children. Beverly Jean Sherrer March 22, 1934. Gail F. Sherrer March 22, 1939.

He further represents that he desires to be enabled to convey his real estate in the same manner and with the same effect as if he were sole and a decree of this Court so that his said wife, if she shall survive him shall not be entitled under the provisions of Section sixteen of Chapter one hundred and thirty-five of the Revised Laws to waive the provisions of a will made by him.

Wherefore he prays that said Court, after due notice to his said wife and full consideration of the premises, will enter a decree establishing the fact of such desertion, and that such living apart from his wife is on his part a justifiable cause.

Dated this twenty-eighth day of June, A. D. 1945.

Edward C. Sherrer

## [fol. 3] IN THE PROBATE COURT OF BERKSHIRE COUNTY

## CITATION

To Margaret E. Sherrer of Monterey, in said County.

A petition has been presented to said Court by Edward C. Sherrer your husband of Monterey, in said County representing that you have deserted him and that he is living apart from you for justifiable cause, and praying that said Court will make a decree establishing the fact of such desertion and that he is so living apart from you.

If you desire to object thereto you or your attorney should file a written appearance in said Court at Pittsfield before ten o'clock in the forenoon on the twenty-fourth day of July 1945, the return day of this citation.

Witness, F. Anthony Hanlon, Esquire, Judge of said Court this twenty-eighth day of June in the year one thousand nine hundred and forty-five.

James W. Carolan, Register.

It is ordered that notice of said proceeding be given by delivering or mailing by registered mail a copy of the foregoing citation to said Margaret E. Sherrer fourteen days at least before said return day and if service be made by registered mail; unless it shall appear that she has received actual notice, by publishing a copy thereof once in each week for three successive weeks in the Berkshire Courier a newspaper published in Great Barrington the last publication to be one day at least before said return day.

Witness, F. Anthony Hanlon, Esquire, Judge of said Court this twenty-eighth day of June in the year one thousand nine hundred and forty-five.

James W. Carolan, Register.

## [fol. 4] IN THE PROBATE COURT OF BERKSHIRE COUNTY

JUDGMENT—October 8, 1945

At a Probate Court held at Pittsfield in and for said County of Berkshire, on the eighth day of October in the

year of our Lord one thousand nine hundred and forty-five.

On the petition of Edward C. Sherrer of Monterey in said County the husband of Margaret E. Sherrer of said Monterey praying that said Court will enter a decree establishing the fact that his said wife has deserted him, and that he is living apart from his said wife for justifiable cause.

Due notice of said petition having been given to the said Margaret E. Sherrer and the allegations of the petition appearing to be true;

It is hereby adjudged and determined that the said Margaret E. Sherrer has deserted the said petitioner, and that he is living apart from his said wife for justifiable cause.

F. Anthony Hanlon Judge of Probate Court.

[File endorsement omitted.]

[fol. 5] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

ANSWER OF MARGUERITE E. PHELPS—Filed July 24, 1945

Now comes Marguerite E. Phelps in the above-entitled cause and, for answer to the petitioner herein, says that she is not the wife of the petitioner, Edward C. Sherrer; that she was granted a decree of divorce from the said Edward C. Sherrer in the Circuit Court for the Sixth Judicial District of Florida by decree entered November 29, 1944 and in a proceeding in which the said Edward C. Sherrer appeared and filed an answer and participated in person and by counsel; that following the granting of said decree of divorce by said court in Florida, the respondent duly married Henry Phelps, her present husband,

Wherefore, the respondent says that this Court has no jurisdiction to make the decree sought by the petitioner herein.

Marguerite E. Phelps, By Frederick M. Myers,  
Her Attorney.

[File endorsement omitted.]

4

[fol. 6] IN THE PROBATE COURT OF BERKSHIRE COUNTY  
[Title omitted.]

REQUEST THAT TESTIMONY BE REPORTED—Filed  
September 24, 1945

In the matter of petition for decree that husband is living apart for justifiable cause

To the Honorable the Judge of the Probate Court in and for the County of Berkshire:

Before any evidence is offered in the above matter, the respondent requests that, upon any appeal, the testimony of witnesses who have been examined orally, be reported to the Supreme Judicial Court.

F. M. Myers, Atty. for Respondent.

[File endorsement omitted.]

[fol. 7] IN THE PROBATE COURT OF BERKSHIRE COUNTY  
[Title omitted.]

APPOINTMENT OF COMMISSIONER—Sept. 27, 1945.

In the above entitled case, at the hearing of the same it is ordered, under the provisions of General Laws. C. 215 § 18, at the request of F. M. Myers, Atty. for Respondent that Irene F. Weston be, and she hereby is, appointed Commissioner to take the evidence in said case, to be reported to the Supreme Judicial Court.

F. Anthony Hanlon, Judge of Probate Court.

[File endorsement omitted.]

[fol. 8] IN THE PROBATE COURT OF BERKSHIRE COUNTY  
[Title omitted.]

REQUEST FOR REPORT OF MATERIAL FACTS—Filed  
October 11, 1945

Now comes the petitioner in the above entitled action and requests a report of material facts on which the decree was based that the petitioner is living apart for justifiable cause.

By his attorneys, Cain & Chesney.

[File endorsement omitted.]

[fol. 9] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

APPEAL—Filed October 23, 1945

Now comes the respondent in the above-entitled matter and appeals from decree entered October 8, 1945, allowing husband's petition that he is living apart for justifiable cause.

Marguerite E. Phelps, described as Margaret E. Sherrer, By F. M. Myers, Her Attorney.

[File endorsement omitted.]

[fol. 10] IN THE PROBATE COURT OF BERKSHIRE COUNTY

REQUEST FOR TRANSMISSION OF RECORD TO SUPREME JUDICIAL COURT—Filed October 23, 1945

KELLOGG & MYERS  
Counsellors at Law  
Pittsfield, Mass.

Walter C. Kellogg

(1877-1941)

Frederick M. Myers

October 22, 1945

James W. Carolan, Esq.,  
Register of Probate  
Pittsfield, Mass.

Dear Mr. Carolan:

Please prepare for transmission to the Supreme Judicial Court all papers required to present appeal of respondent in the matter of Edward C. Sherrer vs. Margaret E. Sherrer.

I shall not expect to have exhibits printed as it is my intention to seek to have exhibits incorporated by reference in the appeal.

Very truly yours, F. M. Myers, Attorney for Marguerite E. Phelps (named in the above proceedings as Margaret E. Sherrer).

[File endorsement omitted.]

[fol. 11] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted]

## Statement of Evidence

## APPEARANCES

Cain & Chesney, Maurice B. Rosenfield, Esq.—For  
Edward C. Sherrer.

Frederick M. Myers, Esq.—For Margaret E. Sherrer.  
Irene F. Weston, Stenographer, September 27, 1945.

[fol. 12]

September 27, 1945

Direct examination.

By Lincoln S. Cain, Esq.:

EDWARD C. SHERRER

Q. What is your full name?  
A. Edward C. Sherrer.

Q. Where do you live?  
A. Monterey, Mass.

Q. You were married at one time to Mrs. Margaret Sherrer?  
A. That's right.

Q. When were you married?  
A. March 15, 1930.

Q. Where were you married?  
A. North Bergen, N. J.

Q. Having been married in North Bergen at that time, where did you live as man and wife immediately thereafter?  
A. In Jersey City.

Q. How long did you both live there in Jersey City?  
A. Approximately a year, I should say.

Q. Where did you move from there?  
A. To North Bergen.

Q. How long did you live in North Bergen?  
A. I should say a year or a year and a half at the most.

Q. Where did you go from there?  
A. Monterey.

Q. About what date was that?  
A. I can tell about the year; I think it was 1932.

Q. Did you live in Monterey with her without moving to any other place until the year 1944?

A. That's right.

Q. Did you live in one house all that time?

A. One house.

Q. Where is that house?

A. That is on the Tyringham Road in Monterey, Mass.  
Near Lake Garfield.

Q. How many children were born of that marriage?

A. Two.

Q. What are the names of the children?

A. Gail Fairfield and Beverly Jean.

Q. Gail is now how old?

A. Six and a half.

Q. Beverly is now how old?

A. Eleven and a half.

[fol. 13] Q. Did you and your then wife and the two children—you four—comprise the entire household in that house on the 1st of April, 1944?

A. Yes.

Q. Did you in March of 1944 (yes or no to this) have some conversation with your wife in reference to her taking a trip?

A. Yes.

Q. Was Beverly, the older child, present during that conversation?

A. Several times.

Q. Referring now to one of those conversations at which Beverly was present, will you tell us what your wife said and what you said relative to her taking the trip?

A. She said her nerves were pretty well shot and she wanted a rest.

Q. What did you say?

A. I agreed to let her go to Florida.

The Court: What did you say—in substance?

A. I told her she could go.

Q. Was there a conversation that month at which Beverly was present when she discussed the length of time that she would be away?

A. Yes, there was.

Q. Will you tell us what she said at that time?

A. She said that she was coming back within a month.

Q. Is that what she said?

A. Yes, sir.

Q. When did she leave?

A. April 3, 1944.

Q. Did she take the two children with her?

A. Yes.

Q. Sometime prior to that, did you go with her to the railroad station and purchase her ticket?

A. No.

Q. Whether or not you purchased a ticket for Florida for her?

A. I gave her the money to get it.

Q. In going, what did she take with her by way of luggage?

A. Just a suitcase and small bag; one for the children, and the suitcase for herself.

Q. Did she have a trunk?

A. No, sir.

Q. Did she have a trunk at the house?

A. Yes, sir.

[fol. 14] Q. What did she leave at the house that belonged to her?

A. Quite a lot of house dresses. A lot of the children's clothes she couldn't possibly take with her.

Q. After she left did you receive a letter from her?

A. I should say about a week or a week and a half after that a postcard.

Q. Did you continue to live in that house for any length of time after she left?

A. I should say fifteen to twenty days after she left.

Q. Then where did you go?

A. To Mr. Kinne's, Sheriff Kinne's, in the village.

Q. Monterey Village?

A. Yes, Monterey Village.

Q. Have you been living there ever since?

A. Ever since.

Q. I show you six envelopes and ask you if those are letters which you received and whether they are in your wife's handwriting.

A. Yes.

Petitioner's Exhibit #1—Letter from Respondent to Petitioner postmarked April 6, 1944.

Petitioner's Exhibit #2—Letter from Respondent to Petitioner, postmarked April 9, 1944.

Petitioner's Exhibit #3—Letter from Respondent to Petitioner, postmarked April 13, 1944.

Petitioner's Exhibit #4—Letter from Respondent to Petitioner, postmarked April 18, 1944.

Petitioner's Exhibit #5—Letter from Respondent to Petitioner, postmarked April 22, 1944.

Petitioner's Exhibit #6—Letter from Respondent to Petitioner, postmarked April 28, 1944.

Q. Aside from the clothing that you have testified to that she left in the house, did she leave anything else that belonged to her?

A. A couple pieces of furniture.

[fol. 15] Q. Anything else?

A. That is all outside of heirlooms, knick-knacks, stuff she couldn't take with her.

Q. At any rate, she didn't take any of those things with her?

A. No.

Q. When did she return to Monterey?

A. The 5th of February, 1945.

Q. On that date where were you living?

A. At the Kinne's in the village.

Q. At this house you told us you went to?

A. Yes.

Q. Was the farmhouse empty?

A. Unoccupied.

Q. Where did she go when she came back?

A. To that farmhouse we formerly lived in.

Q. Has she been living there from February 5, 1945, to the present time?

A. Yes.

Q. Who has been living there with her?

A. Henry Phelps, her new husband.

Q. To your knowledge, has anyone else been living in that place with them other than your children?

A. No.

Q. Have you continued to live at the Kinne place?

A. I have.

## Cross examination.

By Frederick M. Myers, Esq.:

Q. You went to Florida some time between the first of May and the first of August of 1944, Mr. Sherrer?

A. No, I did not.

Q. Did you go to Florida at all in the summer of 1944?

A. I did not. I went in the fall.

Q. Let us find out exactly when it was you went, without regard to the seasons—just give the month.

A. I left New York on November 8th and arrived at St. Petersburg the 9th of November.

Q. How long were you in Florida?

A. Until the 18th.

[fol. 16] Q. While you were in Florida, did you employ an attorney?

A. I did.

Q. Before you left for Florida, had you received any kind of summons issued by the Florida court?

A. I had.

Q. Have you that summons with you?

A. I believe so. I think my attorney has it.

Q. Did you get this letter and its contents from Florida on or about the date which appears on the envelope?

A. Within a couple of days.

Respondent's Exhibit #1—Summons from Circuit Court of Pinellas County, Florida, in the case of Marguerite Eleanore Sherrer vs. Edward Charles Sherrer.

Q. After receiving that summons, did you immediately take any steps to employ counsel in Florida?

A. I consulted Judge Brothers, and he immediately referred me to a lawyer in Florida.

Q. At any rate, my question was whether or not you took steps to employ a lawyer in Florida. I think your answer was responsive, but did you communicate with some law firm in Florida?

A. I did.

Q. In St. Petersburg?

A. Yes.

Q. What was the name of the firm?

A. Bradley & Wehle.

Q. Was Mr. Wehle's first name Victor?

A. Right.

Q. And when the matter of the trial of the case came up in Florida, you were present in court, were you not?

A. I was in the Judge's chambers.

Q. When the case was tried?

A. Yes.

Q. Among the letters which you received from the then Mrs. Sherrer after she had gone to Florida, there was one dated April 22 and registered, was there not?

A. Yes. It was registered.

[fol. 17] Q. Do you recall receiving that particular letter—Exhibit 5?

A. Yes, I received that letter.

Q. You received it on or about the 22nd day of April, 1944?

A. On or about that date.

Q. Did you read it?

A. I read it.

Q. And you noticed the contents included the statement that Mrs. Sherrer—as she was then—was not coming back to you; she would not live with you?

A. I noticed it.

Q. This letter also contained a return of the money which you had sent down to her to buy her passage back, did it not?

A. I sent her the money in general but didn't know what she would use it for. I supposed it would be for that purpose.

Q. But at any rate she returned some money in this letter?

A. That's right.

Q. After you received that letter did you write a letter either to her or to the children in which you suggested committing suicide?

A. I may have.

Q. Is it your memory as to whether you did or did not?

A. At that particular time I would depend too much on my memory, the condition I was in.

Q. Did you in your letter refer to your intention as being the intention to go on a long journey?

A. That's right.

Q. And not write to your children again?

A. Right.

Q. Was your letter to the children rather than to Mrs. Sherrer?

A. It was.

Q. Previous to the time of your wife's leaving for Florida in April, had she at any time been under a doctor's care—I mean within a twelve-months' period previous to that? For sinus trouble, for example?

A. Yes.

Q. With what doctor?

A. Dr. Marnell.

Q. How long had that sinus condition existed?

A. I should say about a year.

[fol. 18] Q. Had there been any other sort of difficulty that your wife had labored under for which she had required the services of a doctor within the past two or three years?

A. Not that I remember.

Q. Had you at any time ever said to your wife anything about the fact, as you deemed it to be a fact, that her mother had been committed for a mental condition?

Mr. Cain: I object.

The Court: Objection sustained.

Mr. Myers: I except.

Q. Had you at any time prior to your wife leaving you, in the presence of any third person—either Beverly or anyone else—said to your wife that her mother had suffered from a mental condition and had to be committed? Yes or no.

A. I would have to qualify that answer.

Mr. Myers: Go ahead and qualify.

A. She acted in such a way that I thought by telling her about her mother's condition it might straighten her out and help her to mend her ways with the children.

Q. Now, Mr. Sherrer, is it true that before your wife left for Florida you had in any form of words whatever threatened to take proceedings against her to have her committed?

A. I don't remember ever threatening to have her committed.

Q. Had the matter of committing your wife to a mental institution been the subject of conversation between you and your wife?

A. Most emphatically no.

Q. On what do you base your statement already made that on February 5, 1945, Mrs. Sherrer returned to Berkshire County?

A. I went by the house and saw lights on. Next morning I saw them.

[fol. 19] Q. As to the precise date when they came back, you don't know, but they were back February 5th?

A. Yes. It was town meeting night.

Q. How long after February 5th was it before you consulted a lawyer regarding the institution of a suit for alienation of affection against Mr. Phelps?

Mr. Rosenfield: Objection.

The Court: Objection overruled.

Mr. Rosenfield: Exception.

A. As soon as they came back, within three or four days. I think it was eight days—the 13th.

Q. Are you sure, Mr. Sherrer?

A. I am not sure, there are so many dates in this case. That is about the time.

Q. Do you recall causing a writ to be issued against Mr. Henry Phelps?

A. Yes.

Q. I show you a summons to see if that in any way refreshes your memory as to when it was that you had that writ issued. I call your attention to the date at the bottom of it.

A. I said the 13th; this says the 12th.

Q. Of February, 1945?

A. Yes.

Q. Do you remember what the cause of action was?

A. For alienation of affection.

Q. And the ad damnum claimed by you?

A. \$15,000.

Q. And that action was brought in the Berkshire County Superior Court by you?

A. Yes, sir.

Q. Mr. Cain: Do you know whether or not Mr. Phelps since your attachment has disposed of his real estate?

A. He has.

That's all.

[fol. 20] Direct examination.

By Mr. Myers:

MARGARET E. PHELPS

Q. What is your name please?

A. Margaret Eleanor Phelps.

Q. You were the wife of the Petitioner here, Mr. Edward Sherrer?

A. Yes.

Q. You have heard the testimony as to some talk with your husband about going to Florida in April of 1944. Was there such talk as was testified to—substantially I mean?

A. Yes.

Q. Did you represent to your husband that it was your intention to go to Florida only temporarily?

A. Yes.

Q. Previous to the time when you had had this talk about going to Florida, had there been some trouble between you and Mr. Sherrer?

A. Yes.

Q. Among other things had there been any suggestion by him as to procuring your commitment to a mental institution? Yes or no.

A. Yes.

Q. Over how long a period of time had that gone?

A. Eight or nine years.

Q. Whether or not during that period of time your husband had threatened to have you committed?

A. He had threatened that.

Q. Will you tell us in your own language substantially what he said to you as to having you committed.

Mr. Rosenfield: I object. Was anyone else present?

Q. At any times when this matter of having you committed had been spoken of by your husband, was anyone present—either the children or anyone else?

A. The children were around.

Q. I ask you to state substantially what it was your husband said with reference to having you committed.

[fol. 21] Mr. Rosenfield: I object.

The Court: Objection sustained.

Q. Was there an occasion when such talk had been had

within the year prior to your leaving for Florida and an occasion when one of the children was present and in a position to hear it?

A. Yes.

Q. Now I ask you the substance of what was said.

Mr. Rosenfield: I object.

The Court: Objection sustained.

Q. Was Beverly present?

A. Yes.

Q. Now go ahead.

A. Shortly before I left he said, "You will be in Northampton within two years."

Q. To refresh your memory, did he say anything about your mother?

A. Yes, he said, "You have got a crazy look in your eyes just like your mother has."

Q. As a result of conversations which your husband had had with you on the subject of commitment, will you state to the Court whether in April, 1944, and just as of the time that you were getting ready to leave for Florida, you were in any fear of proceedings being instituted to have you committed.

A. Yes.

Q. Did your fears about being committed have to do with any decision you arrived at as to going to Florida?

A. Yes.

Q. When you stated to your husband (as has been testified to) that you were going to be in Florida only temporarily, were those statements true?

A. No.

Q. What was your intention with reference to staying in Florida as of the time you left in April?

A. I intended to stay there. I couldn't tell him that.

Q. But it was your intention to stay there?

A. Yes.

[fol. 22] Q. From the time you left until for example, the time you wrote the letter in which you returned the money to your husband, did you change that intention at all?

A. I did not change my intention to stay there.

Q. Why did you pick out Florida, Mrs. Phelps, as against some other location?

A. The doctor thought it would be a good place for me. I had had trouble with sinus and I was run down and nervous.

Q. It was at Dr. Marnell's advice that you went to Florida?

A. Yes.

Q. Were you aware of the fact that in leaving as you did, you were leaving among other things a great number of your own personal belongings and some of the children's?

A. Yes.

Q. Were you also aware of the fact that in leaving as you did, you were leaving your interest in the real estate where you had previously lived with Mr. Sherrer?

A. I realized it. I couldn't stand it any longer.

Q. Did you also have in mind, previous to the time you left, that when you got down there you would consult attorneys with reference to seeking a divorce?

A. I could have gotten a divorce here, but I had to get away.

Q. Had you previously consulted counsel in Massachusetts about getting a divorce?

A. I had spoken to Judge Brothers.

Q. And you understood there was a possibility of your getting a divorce in Massachusetts?

A. Yes.

Q. Did you also consult him as to the possibility of your establishing a residence and getting a divorce in Florida?

A. I asked if I could get one there as well as here, and he said yes.

Respondent's Exhibit #2—Transcript of the record of the Florida divorce in the case of Marguerite Eleanore Sherrer vs. Edward Charles Sherrer. ●

[fol. 23] Q. Mrs. Phelps, were you familiar with the contents of the bill of complaint which was filed in the Florida court and which I just read from the transcript of the record? As to the allegation of your husband's treatment of you?

A. Yes.

Q. I ask you whether or not the statements contained therein in those allegations were true?

Mr. Cain: I object.

The Court: Objection overruled.

A. They are true.

Q. Following the issuance of your divorce decree on November 29, 1944, you were married to Mr. Phelps in Florida?

A. Yes.

Q. And the date of that marriage was when?

A. December 1st.

Q. Did you and Mr. Phelps establish a home in Florida immediately upon your marriage?

A. We had the same residence I had had previously.

Q. As of the time of your marriage, was it still your intention to make your home permanently in Florida?

A. Yes, it was.

Q. After your marriage was it your intention still to continue to make your home in Florida?

A. Yes.

Q. What was Mr. Phelps doing and what were you doing by way of earning a living in St. Petersburg?

A. I was working as a waitress in a restaurant in St. Petersburg. Mr. Phelps was in a lumber yard.

Q. And did you consider your own job as a permanent job?

A. Yes.

Q. Without asking for the conversation, had the matter of your continuing to live and make Florida your home been the subject of conversation between you and Mr. Henry Phelps, your husband?

A. Yes.

Q. Now, did something happen after the first of the year 1945 which had to do with your coming back to Berkshire County?

A. Yes.

[fol. 24] Q. I show you a letter. Did you ever see that letter before?

A. Yes, I have.

Q. That letter came to your husband, Mr. Henry Phelps?

A. Yes it did.

Mr. Myers: I shall offer this, but think it should come through Mr. Phelps.

Q. Was it as a consequence of receiving that letter that you and your husband and the two children went back to Monterey?

A. That was when my husband went back.

Q. And you went with him?

A. Yes.

Q. And you took the two children?

A. They were already in Monterey.

Q. They had been sent to Monterey in accordance with the decree which was entered in the Florida court?

A. That's right.

Q. At the time of your leaving for Monterey sometime in February of 1945, was it then your intention to give up your residence in Florida and go back to Massachusetts to live?

A. No, it was not.

Q. After you arrived in Monterey you did go to the property where you and Mr. Sherrer had previously lived?

A. Yes.

Q. By the way, who was the owner of that property?

Mr. Rosenfield: Objection.

The Court: Objection over-ruled.

Mr. Rosenfield: Exception.

A. Mr. Sherrer and I owned it.

Q. From whom had that property come to you—any interest in it that you had?

Mr. Rosenfield: I object.

The Court: Objection overruled.

A. The property came from my mother.

Q. What was her name?

A. Grace Scott.

[fol. 25] Q. After arriving in the Berkshires with your husband, Mr. Phelps, did you learn of the fact that a suit had been brought against him which has already been testified to?

A. Yes.

Q. Whether or not the fact of the bringing of that suit has had any influence upon you and your husband in your continuing to stay in the Berkshires since February, 1945?

A. Yes.

Q. And it is true that since you came you have been liv-

ing in the property near Lake Garfield which has been mentioned?

A. Yes.

Q. At the time when you left Florida to come back here after this letter had been received; what did you do in the way of retaining any place to live down in Florida, so that after what this letter referred to was taken care of, you could then go back to Florida?

A. We kept our house there.

Q. After the suit had been brought against your husband and you found it was necessary to stay here, did you give up that house?

A. Yes, we found we had to stay here.

Q. Until the time those papers were served on your husband, had you in any way given up your residence in Florida?

A. No.

Q. It was still your intention to continue to live there?

A. Yes.

Q. Did you express that intention in any letters you wrote to friends of yours?

Mr. Rosenfield: Objection.

The Court: Objection over-ruled.

Mr. Rosenfield: Exception.

A. Yes.

Q. Will you name a friend to whom you wrote on that subject?

A. Mrs. Ted Sokoloski.

Q. Approximately when was it you wrote her?

A. During the summer of 1944.

Q. After you got to Florida?

A. Yes.

/{fol. 26] Q. Can you put it between certain dates?

A. After April at any rate and before September; it was July or August.

Q. You, of course, do not have that letter.

A. No.

Q. Where is Mrs. Sokoloski?

A. In Arkansas.

Q. Did you while in Florida, sometime in the month of July, receive a letter from any public service agency of the City of St. Petersburg, having to do with the subject of your having permanent residence in St. Petersburg?

A. Yes.

Q. I show you the letter and ask you if that is the letter that you received.

A. Yes.

Mr. Myers: That's all.

Cross examination.

By Mr. Cain:

Q. When you were living with Mr. Sherrer in Monterey in the year 1943 and the early part of 1944, had you and he separated at any time, even for a short while?

Mr. Myers: I will take Your Honor's ruling.

The Court: I will hear the answer.

A. You mean live apart?

Q. Yes, even for a short while?

A. No.

Q. You had, however, argued with each other to some extent during that time.

A. Yes.

Q. But your discussions with him in March about going to Florida for a trip were friendly discussions, were they not?

A. Yes.

Q. The element of quarreling did not enter them in any way, did it? I mean when you were discussing with him the matter of taking this trip.

A. No.

Q. During that time you did tell him definitely that you would be gone about a month, didn't you?

A. Yes.

[fol. 27] Q. But you now say that those statements to him were a deliberate untruth.

A. Yes.

Q. And your daughter Beverly was present at some of those occasions when you uttered the deliberate untruth, was she not?

A. Yes.

Q. And you told your daughter Beverly, when telling her that she was to drop her school in Monterey and go to Florida, that it was only going to be for a short time, didn't you?

A. Yes.

Q. And that was a deliberate untruth to your daughter, wasn't it?

A. It was.

Q. At any rate, you made arrangements with Beverly's school to have her transferred in some way to a school in Florida.

A. Yes.

Q. And in doing so, did you say anything to the school authorities in Monterey about how long she would be out of the Monterey schools?

A. I don't remember.

Q. In other words, you may have said to them that she would only be gone for a few weeks?

A. I can't remember.

Q. As a matter of fact, Mrs. Sherrer, you didn't place Beverly in school in Florida for some weeks after you got there, did you?

A. I think it was two weeks.

Q. You think it was two weeks?

A. Yes.

Q. Were there other people in Monterey with whom you discussed your trip to Florida besides the ones we have mentioned?

A. A lot of people in Monterey knew I was going.

Q. And lots of people knew you were going from statements you yourself made?

A. I talked about going—about the trip.

Q. And to many of them you said it was only a trip, and you would be back soon; didn't you?

A. That was all I could say.

Q. That was what you did say to a great many of your friends in Monterey, is that correct?

A. Some of them, I suppose.

[fol. 28] Q. Not a great many, only some, is that right?

A. I don't make a habit of telling my business very much.

Q. At any rate, to some of your friends you also told deliberate untruths with reference to your intentions?

A. Yes.

Q. Did you talk it over with your friend Henry Phelps?

A. No.

Q. The subject of your going to Florida was not dis-

cussed with your friend Henry Phelps during the month of March in the slightest degree, was it?

A. I didn't have discussions with him.

Q. Was he in Monterey during the month of March?

Mr. Myers: I pray Your Honor's judgment.

The Court: That is a proper question.

A. Yes.

Q. Do you mean to tell us you didn't see him that month at all?

A. I saw him.

Q. Did you see him to talk to that month at all?

A. Yes.

Q. As a matter of fact, you talked to him several times that month, didn't you?

A. Yes.

Q. In your own home sometimes?

A. Yes.

Q. And in other places?

A. As he went by.

Q. You talked to him several times in other places during the month of March?

A. I don't remember definite times.

Q. Don't you remember whether you talked to him on other occasions than at your own home during that month?

A. I can't remember.

Q. As a matter of fact, you saw him on occasion at places in Great Barrington that month.

Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

A. No.

Q. But in none of those conversations you had with Mr. Phelps was the subject of your trip to Florida mentioned at all, is that right?

A. That's right.

[fol. 29] Q. Do you know when it was that Mr. Phelps left Monterey?

A. No.

Q. Was he in Monterey when you left, if you know?

A. Yes.

Q. You left, Mrs. Sherrill, on the 3rd of April, didn't you?

A. Yes.

Q. And you and your then husband, Mr. Sherrer, were both at home in Monterey on April 2nd, the day before you left?

A. Yes.

The Court: At this point in the hearing it was stipulated by counsel for both parties that in the event that the Florida divorce is found to be invalid, the Petitioner—Edward C. Sherrer—is now living apart for justifiable cause.

Q. Did you know when you left for Florida on April 3rd that Mr. Henry Phelps was planning to go to Tampa in the immediate future?

A. I did not.

Q. What date did you arrive in Florida?

A. April 4th.

Q. The very next day after you left?

A. Yes.

Q. In what town?

A. Tampa.

Q. Did you and the children stay in Tampa that night?

A. We stayed there overnight.

Q. At a hotel?

A. Yes.

Q. What was the name of that hotel?

A. I think the name was the Marlboro.

Q. Did you leave Tampa the next day and go to some other town or city?

A. We went to St. Petersburg.

Q. Did you go to a hotel in St. Petersburg? For that night?

A. We went to an apartment.

Q. You mean you hired an apartment?

A. Yes.

Q. For how long a time did you hire the apartment?

A. I had it for three weeks.

Q. Did you engage it for three weeks when you first took it?

A. I was trying to get an apartment through the [fol. 30] Chamber of Commerce and they sent me to this place temporarily. The place where I first went they didn't want to let in any children.

Q. So you did stay in that apartment for three weeks and no longer.

A. Yes.

Q. What was your next address?

A. 2409 Fourth Avenue.

Q. What kind of a place was that?

A. A small cottage.

Q. Near the water?

A. We used to take a trolley to the water.

Q. How large a place was that cottage?

A. Three rooms and two porches.

Q. Was the cottage furnished or unfurnished?

A. Furnished.

Q. Completely furnished?

A. Yes.

Q. How long did you stay in that cottage?

A. Until August.

Q. Do you remember what part of August?

A. The first part. The house was sold and we had to move.

Q. Then did you take another place in St. Petersburg?

A. Yes.

Q. What kind of a place was that?

A. Another small cottage.

Q. Nearby?

A. Within seven blocks.

Q. Was that also completely furnished?

A. Yes, it was.

Q. How long did you stay there?

A. Until February.

Q. Until you left Florida?

A. Yes. Until we left, we still kept the cottage.

Q. You were married on December 1st and lived in that cottage from that date?

A. Yes.

Q. You didn't go on any trip?

A. No.

Q. Have you ever been to Florida since leaving it on February 5th?

A. No.

Q. For how long a time did you keep the cottage that you testified you kept after leaving on February 5th?

A. We kept it for a month after that.

Q. Were you paying rent by the month for that cottage?

A. Yes.

[fol. 31]. Q. Did you communicate with the owner that you did not want it any more after you got back to Monterey?

A. I asked him to keep some of our things that were there for us.

Q. By letter you asked that?

A. Yes.

Q. Is that the same letter you wrote saying you did not want the cottage after a month?

A. I asked him to keep our things for us.

Q. And it was in that same letter you told him after the expiration of a month, you would not want the cottage any more?

A. No.

Q. In a different letter?

A. Yes.

Q. In that same letter you asked to have the things sent to you?

A. No.

Q. They still have them?

A. They were sent up later.

Q. How much later?

A. The early part of the summer.

Q. When you first arrived, did you consult an attorney about a divorce?

A. Not at first.

Q. Do you know whether Judge Brothers had written to an attorney about you before you left?

A. I don't know.

Q. Did you go to see the attorney whose name Judge Brothers gave you?

A. He didn't give me any name.

Q. Judge Brothers did not recommend an attorney to you before you went down?

A. No.

Q. Did you go to see an attorney after you got there whom somebody else up here had recommended?

A. No.

Q. What was the date you went to see an attorney about getting a divorce?

A. In July.

Q. So that from April 5th, or 4th, when you arrived, to some date in July, you consulted no attorney about a divorce at all?

A. No.

[fol. 32] Q. Had Judge Brothers informed you that you would have to wait three months in Florida before you could apply for a divorce?

A. I didn't ask him.

Q. Had somebody else so informed you?

A. No.

Q. So that when you went to this attorney in July, before going to him you had no idea how long a period of time you had to wait before applying for a divorce in Florida?

A. No.

Q. None whatever?

A. No.

Q. Do you remember what date in July you went to him?

A. The 7th, I think.

Q. This is your signature here, isn't it?

A. Yes.

Q. Do you remember taking an oath to this paper at the time you signed it?

A. Yes.

Q. And I call your attention to the Notary Public to whom you made oath and signed here. "Sworn to and subscribed the 6th day of July."

A. Yes.

Q. Do you now say it was the 6th day of July or before that that you saw this attorney?

A. The 6th.

Q. After you saw this attorney, did he draw up this paper while you were in his office and you signed it that very same day?

A. Yes.

Q. What was the name of the lawyer that you first talked with about getting a divorce in Florida?

A. Thomas Collins.

Q. And you went to Mr. Collin's office on some day in July?

A. Yes.

Q. Did you see Mr. Collins himself when you first went there?

A. Yes.

Q. And did you tell your story to him and tell him what you wanted?

A. I did.

Q. Did he then, immediately after listening to your story, prepare this bill of complaint?

A. He asked me questions and I answered them.

[fol. 33] Q. Did you wait in his office while it was being typed?

A. I went out and then came back.

Q. But that very same day you came back and signed it?

A. Yes.

Q. Did he tell you that it would be possible to apply for a divorce in Florida immediately at that time?

Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

A. Yes.

Q. Did he tell you that you had waited just long enough?

A. He didn't say.

Q. Did he tell you that the period of waiting in Florida for a divorce was ninety days or three months?

A. No.

Q. So that you have never been so advised by any attorney or by anybody from the time you left Massachusetts until the present day that three months is the waiting period in Florida?

A. I asked him if he could start proceedings and he said yes.

Q. What was it that prompted you to go to a lawyer about a divorce on that particular day—July 6th?

A. I had just begun to feel well enough. I didn't feel well when I first went down.

Q. Is that the only reason?

A. Yes.

Q. That your health had improved?

A. Yes.

Q. When did you first see Henry Phelps down there?

Mr. Myers: I pray judgment.

The Court: I will hear the answer.

Mr. Myers: I except.

A. I don't remember.

Q. Don't you remember what month it was?

A. April.

Q. Don't you remember whether it was one week after you arrived or three weeks?

A. Not exactly.

Q. As a matter of fact, Mrs. Sherrer, it was about a week after you arrived that you first saw him down there, wasn't it?

A. I don't remember exactly how long.

[fol. 34] Q. You don't even remember approximately how long?

Mr. Myers: Objection.

The Court: Sustained.

Q. At any rate, you saw him some time within three weeks after you got there?

Mr. Myers: I will take Your Honor's ruling.

The Court: The question is allowed.

A. Yes.

Q. Where did you see him?

A. On Central Avenue.

Q. On the street?

A. Yes.

Q. Where were you living at that time?

A. 406 Manhattan Court.

Q. Did Mr. Phelps call at your house on various occasions after that?

Mr. Myers: I pray judgment.

The Court: I will hear the answer.

Mr. Myers: Exception.

A. Yes.

Q. As a matter of fact, Mr. Phelps was a very frequent caller at your house from the time you first saw him in April until you got your divorce, wasn't he?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. He came once in a while.

Q. Did he come as often as once a week?

A. Not always.

Q. Did he sometimes come more than once a week?

A. Occasionally.

Q. Did two weeks ever go by during which he did not come?

A. Yes.

Q. Did three weeks ever go by during which he did not come?

A. Yes.

Q. Were there whole months during which he did not come to see you?

A. Yes.

[fol. 35] Q. Were there whole months during which you did not see him anywhere?

A. Yes.

Q. You got a job, didn't you?

A. Yes.

Q. What was the first job you got?

A. I was working in a doctor's home.

Q. How long did that job last?

A. Until they went North.

Q. How long?

A. A month.

Q. When did you first get that job?

A. About the first of May.

Q. So that you were there practically the month of May?

A. Yes.

Q. Did you get another job after that?

A. Yes, they recommended me to a friend of theirs—another doctor.

Q. Did you get the job?

A. I got it.

Q. When?

A. In June.

Q. Was that also working for a doctor in his home or in his office?

A. In his home. I took care of their boy and did cooking.

Q. How long did you keep that job?

A. About three weeks. They also went away.

Q. Then did you get another one?

A. I had a job in a restaurant down there.

Q. That is the job you kept?

A. I had two jobs.

Q. How long did the first one last?

A. A week.

Q. When did you get the next one?

A. About a week after that.

Q. And that job you kept until February?

A. Yes.

Q. That was as a waitress in a restaurant?

A. Yes.

Q. You wrote some letters to your husband in April, didn't you?

A. Yes.

Q. Did you write any letters to him after April?

A. I can't remember the exact date.

Q. Did you write any?

A. I don't know.

[fol. 36] Q. Don't you remember whether you wrote any letters during May, June, July, August, September, October, or not?

A. I returned money to him. I don't remember when.

Q. I show you that one and ask if that is the letter you wrote him on April 27th (Exhibit 6)? No question about that?

A. No.

Q. Having seen this letter, do you remember whether you wrote him any letters at all after that?

A. No, I don't.

Q. You don't remember—is that what you mean?

A. I don't remember.

Q. You don't remember writing him any more do you?

A. I wrote him I wasn't coming back, but I don't remember whether it was before or after that one.

Q. On April 22nd you mailed to him a letter by registered mail, in which you told him you were not coming back, didn't you?

A. Yes.

Q. And this is the letter, isn't it? (referring to Exhibit 5).

A. Yes.

Q. I now ask you again—did you write him any letters after April 27th?

A. I don't think so.

Q. The reason you told your husband before you left that you would be back in a month was so he would let you go away, wasn't it?

A. Yes.

Q. You would not have lied to him except that you felt he might hold you there and not let you go, isn't that so?

A. Yes.

Q. Do you remember writing him after you got down there, referring to the fact that you were looking for reservations for getting back?

A. Yes.

Q. Had he written you a letter before you wrote him, speaking about reservations, in which he said he was coming down?

A. He telephoned.

Q. Had he written you to that effect?

A. He said he might come down.

[fol. 37] Q. That was the letter you got from him before writing him that you were looking for reservations, is that right?

A. Yes.

Q. Have you got that letter?

A. No.

Q. Did you destroy it?

A. I destroyed the letter.

Q. When was it that he phoned you?

A. It was during the first three weeks—when I was at Manhattan Court.

Q. In that telephone call he told you he might be down?

A. He told me he would have troopers looking for me. He threatened me.

Q. He told you he was going to have troopers bother you down in St. Petersburg?

A. Yes.

Q. And is that the reason you wrote him a letter saying you were looking for reservations and would be home?

A. I wanted to make him think I would be coming back.

Q. I show you this letter (Exhibit 4) and ask you if that is the letter you have in mind?

A. Yes.

Q. And you tell us, Mrs. Sherrer, you wrote this letter—among other things—for the purpose of preventing his coming down to see you?

A. Yes.

Q. In it you said, "We can get reservations if we are not fussy about trains. I heard some of them asking for drawing rooms, but they just put their names down. Next time you write you had better address the letter to General Delivery, St. Petersburg, as I would like to get near another beach if possible for the rest of our stay." That was said for the purpose of keeping him back in Massachusetts?

A. Yes.

Q. And for no other purpose?

A. Yes.

Q. It was an out-and-out falsehood.

A. Yes.

Q. And didn't convey the true state of your mind.

A. No.

Q. As a matter of fact, he didn't come down within several weeks or months of that letter, did he?

A. No.

Q. Did he telephone again?

A. No.

[fol. 38] Q. Did he write any more letters to you saying that he might be down?

A. He sent telegrams.

Q. In them did he say he might be down?

A. No, I don't think so.

Q. Did he write any letters saying that he might be down?

A. Yes.

Q. Did he write more than one letter after that saying that he was coming down?

A. I don't remember.

Q. But he wrote you at least one.

A. Yes.

Q. After you received a letter from him at some time after all this saying he might come down, did you take any further steps at all to prevent his doing so?

A. No.

Q. You put Beverly in school, is that right?

A. Yes.

Q. When did you do that?

A. When we were at Manhattan Court, I think.

Q. Do you remember the approximate date?

A. About the middle of April.

Q. Did Beverly stay in the same school through the school year?

A. She was transferred to another school when we moved.

Q. Before the end of that school year?

A. Yes.

Q. At any rate, you kept her in some school through the school year?

A. Yes.

Q. In the fall, did she go to school again?

A. Yes, she did.

Q. Did she stay in that school up to the time she left?

A. Yes.

Q. Did you have a talk with Beverly about coming back?

A. I didn't tell her that I was not coming back.

Q. You never told Beverly that you weren't coming back? Did you tell her you were coming back?

A. I let her think we were.

Q. Did you tell her that you were?

A. I may have.

Q. And it is a fact, too, isn't it, that Beverly told you many times that she wanted to come back?

[fol. 39] Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

A. At first, then she became more contented.

Q. To your knowledge, when did Mr. Scherrer arrive down there?

A. November was the first time, I think.

Q. In November there was a hearing on the divorce?

A. Yes.

Q. Was the hearing held in the Court room—where there was a Judge's Bench—or in what we call Chambers?

A. There was a bench.

Q. A large Court room?

A. Yes.

Q. Mr. Sherrer's lawyer was present?

A. Yes.

Q. Was Mr. Sherrer present?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. He was there.

Q. Was Mr. Sherrer there in the Court room all during the time that you were testifying?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I don't remember his going out.

Q. Were you there when he testified?

A. Yes.

Q. After you married Mr. Phelps, you and he came back together the first week of February?

A. Yes.

Q. Why did you come back?

A. Because his father was taken ill and wasn't expected to live.

Q. On going away you had an arrangement with your landlord that he would keep the cottage for you for one month, is that so?

A. Yes, until we found out the conditions.

Q. You didn't ask the landlord to hold it for more than one month, did you?

A. He said whenever we came back, he would have a place for us.

[fol. 40] Q. And it wasn't until after you got back that you first heard about this lawsuit against Mr. Phelps?

A. Not until after we got back.

Q. Shortly after you got back?

A. Yes.

Q. Were you planning to go back to Florida as soon as Mr. Phelps' father's health cleared up?

A. Yes.

Q. Did his health clear up?

A. He got a little better, but he is not very well—never very well.

Q. He is still living?

A. Still living.

Q. After he got a little better, you would have gone back except for the lawsuit?

A. Yes.

Q. So that the only thing which held you and Mr. Phelps in Monterey, after you got back here, was the lawsuit?

A. We wanted to see if Mr. Phelps, Sr. got better.

Q. But he did get better?

A. Yes.

Q. He got enough better so except for the papers you would have gone back, is that so?

A. We would have gone back.

Q. Town meeting came shortly after you got back in Monterey, didn't it?

A. Yes.

Q. Did you attend it?

A. No.

Q. Have you voted in any way in Monterey since you got back?

A. No.

Q. All your things in Florida have now been sent for, isn't that so?

Mr. Myers: I will take Your Honor's ruling.

The Court: I will hear the answer.

A. Yes.

Q. You were under the impression, were you, Mrs. Phelps, that so long as the alienation of affection case was pending against you here, you had to stay here all the time?

A. We can't afford to go back and forth.

Q. When did Beverly come back from Florida to here?

A. In November.

[fol. 41] Q. After Beverly came back, did you write Beverly a letter indicating that you were thinking of going to California?

A. Yes.

Q. And is it a fact that some time between November and February you were considering such a trip?

A. A trip, yes.

Q. It was just a trip?

A. Yes.

Q. So that although you are not able to afford to make a trip to Florida and come back for the trial of this case, you could afford to take a trip to California?

A. We had a chance to go with some other people.

Q. You and your husband?

A. Yes.

Q. But you went to Florida to live because you wanted to live in a warm climate, didn't you?

A. Yes, the doctor advised me to go there.

Q. After you got there, you still had that desire to live in a place with a warm climate?

A. I liked it there.

Q. Because of the warm climate?

A. I liked it down there.

Q. But one of your main reasons for liking it is that it has a warm climate?

A. That is one of them.

Q. At any rate, Mrs. Phelps, you felt, and have ~~felt~~ ever since you got back here, that it is absolutely necessary for you to stay here because of this lawsuit, haven't you?

A. Yes, because we could not go back and forth.

Q. Did you ever, at any time while you were down there, send for your clothing that you had left in Monterey, or for your trunk or for any of your furniture?

A. I knew it wouldn't do me any good to send for anything.

Q. But did you?

A. No.

Q. What things were there that you left down there when you came back here in ~~February~~?

A. Mostly clothes.

Mr. Cain: That's all.

[fol. 42] Redirect examination.

By Mr. Myers:

Q. Were you and your husband advised by your attorney to stay and fight this suit which had been brought against you?

A. Yes.

Recross examination.

By Mr. Cain:

Q. Were you also advised by your attorney that your presence was essential all the time your suit was pending and before trial?

A. No.

Q. So that the reason you have been staying here all this time is not because the suit is pending but because, as you say, you can't afford to go down there and come back for the trial?

A. Yes.

Q. Were you advised by your attorney as to when the case was likely to be reached for trial?

Mr. Myers: I will take Your Honor's ruling.

The Court: I will hear the answer.

A. At first I thought it was the first date which is on the paper, which is sometime in April, I think.

Q. There was an April date on the summons?

A. I think so.

Q. When you asked him, he said no, didn't he?

A. Yes.

Q. Didn't he tell you that it could not possibly be tried before October of this year?

A. Yes.

Q. So that you knew, Mrs. Phelps, in making your decision not to go back to Florida after Mr. Phelps, Sr. got better, you knew there would be no need of your presence up here at least until October, didn't you, as far as that case was concerned?

A. Yes.

Mr. Cain: That's all.

[fol. 43] Direct examination.

By Mr. Myers:

HENRY A. PHELPS

Q. What is your name?

A. Henry Arthur Phelps, Jr.

Q. You are the husband of the witness who just testified?

A. I am.

Q. You have an aunt whose first name is Susan?

A. Yes.

Q. What is her other name?

A. Kupec.

Q. Where does she live?

A. Westfield, Mass.

Q. After you had married your present wife, what was your intention with reference to where you were going to make your home?

A. In Florida.

Q. Did you secure a job there?

A. I did.

Q. Were you working at that job between the time of your marriage and the time you got a certain letter from your aunt?

A. I was.

Q. You had left certain property in Massachusetts when you went from Monterey to Florida?

A. Yes.

Q. What did that property consist of?

A. It was run-down land and I put a shack on it.

Q. In Monterey?

A. Yes.

Q. Before you went to Florida, had you made any negotiations about disposing of that property?

A. No.

Q. After you got there, had you entered into some negotiation about disposing of it?

A. No.

Q. Who was living in that house after you left and went to Florida?

A. My father.

Q. I show you a letter and envelope and ask you when you received it, with reference to the postmarked date?

A. The 28th of January, I think, something like that.

Q. At any rate, was it about the time of the postmark?

A. Yes.

[fol. 44] Q. And you received it while you were in Florida?

A. Yes.

Q. As a result of receiving that letter, what did you do?

A. We were not fixed to come right then, but made it so we could come up to see my father.

Q. Where did you come to?

A. Westfield first.

Q. And then?

A. To Monterey.

The Court: Letter from Aunt Susan to Henry Phelps, dated January 25, 1944, marked Exhibit "A" for identification.

Q. As a result of getting that letter, you came back to Monterey. In what condition did you find your father?

A. He was very sick when we first came back.

Q. For how long was it before his condition changed materially for the better—approximately?

A. About two weeks, I guess.

Q. Before his condition had changed for the better, were you served with a summons in the suit brought by Mr. Sherrer against you—the summons which I hand you?

A. Yes, I was.

Q. Do you remember the exact date when it was served?

A. I don't know.

Q. Was it on or about February 12, 1945?

A. Yes, it was.

It is agreed that a writ was served in an action brought by Edward C. Sherrer against Henry Phelps for Alienation of Affections and Loss of Consortium (sic), returnable to the Berkshire County Superior Court April 2, 1945; ad damnum \$15,000; date of the writ, February 12, 1945. The time when it was served on the witness to be governed by the testimony.

Q. After that was served, did you and your wife consult an attorney about the matter?

A. Yes.

Q. Without going into the subject matter of the consultation at all, will you state whether there have been [fol. 45] numerous conferences on the subject matter of that suit between the time when it was served on you and the time when this particular petition which is now being heard was served on Mrs. Phelps.

A. Yes.

Q. Both you and your wife have taken part in those discussions and negotiations?

A. Yes, sir.

Q. Whether or not you and your wife have reached a decision—after discussion—as to staying in Berkshire County to meet this charge that is in this suit?

A. Yes.

Q. What is the decision?

A. We intend to stay until the case is tried.

Cross examination.

By Mr. Cain:

Q. Did you have occasion to talk with Mrs. Sherrer back in March 1944, about her trip to Florida?

A. I knew nothing of her going to Florida.

Q. When did you go to Florida?

A. About the 14th of April, I think.

Q. When did you leave Monterey?

A. About two days before that.

Q. You went direct from Monterey to Florida?

A. Yes. I was a day and night on the way, I think.

Q. At that time, when you left Monterey for Florida, you knew Mrs. Sherrer had gone to Florida?

A. Yes, it was nation-wide talk. Everyone knew she had gone.

Q. But you for one never talked with her about her trip before she left?

A. No, I did not.

Q. You saw her frequently before then, didn't you?

A. I went down there when my father was sick. When he was staying with me, he was sick and I went down there occasionally to use the phone to call the doctor.

[fol. 46] Q. Did you meet Mrs. Sherrer about once every week in Great Barrington during the months of February and March, 1944?

Mr. Myers: Objection.

The Court: Objection over-ruled.

A. No.

Q. And you heard from no source whatever prior to her going that she was going to Florida?

A. I said once it was nation-wide talk in Monterey.

Q. What was nation-wide talk?

A. Her going to Florida; that she had gone.

Q. Also before she went?

A. I was sick at the time and didn't see hardly anyone in the town except the doctor.

Q. During the month of March you were sick and didn't hear the nation-wide talk?

A. Not until I got out.

Q. When did you get out?

A. Around the 1st of April.

Q. Then you heard it?

A. Yes.

Q. So that when Mrs. Sherrer left, you had already heard some talk that she intended to go?

A. No, that she had gone.

Q. Do you remember when you got out from your sickness with reference to the time that she left for Florida?

A. I didn't know when she left. I got out about the 1st of April.

Q. You saw her after that?

A. No, I did not.

Q. When did you last see her before she went?

A. The first part of March when my father was sick, and then I had the mumps.

Q. Your father had a heart condition?

A. Yes, sir.

Q. Did he have a series of heart attacks the early part of March?

A. No, I don't think he had a heart attack. He had rheumatism. He was in bed and I called the doctor.

Q. Before you got the mumps?

A. Yes.

Q. Was your father sick throughout the month of March and into April?

A. He was able to be around when I was taken sick. Somebody had to be around. I couldn't get out of bed.

[fol. 47] Q. Who lived with your father, except you, at the time?

A. No one.

Q. So that when you went to Florida, your father was left alone?

A. Yes, he was much better.

Q. But he had, however, had heart attacks prior to that?

A. Not heart attacks. He had rheumatism, but he had gotten over it.

Q. Was it rheumatism you called the doctor for?

A. Yes.

Q. At various times when you were in Florida, you got word your father had taken sick?

A. Yes.

Q. Did you at any time after you went to Florida, and prior to February 3rd, respond to any of these pieces of information about your father's condition and come back to visit him or in any way respond?

A. No, he wasn't down sick in bed until I got that letter that I know of.

Q. As far as you knew, he was living alone?

A. No, he was with his sister in Westfield some of the time and some of the time in Great Barrington.

Q. And some of the time in the house in Monterey?

A. Shortly after I left, he went to Great Barrington.

Q. When did you decide to go to Florida?

A. I heard they were making big money down there, so I went to Tampa in the ship yard.

Q. When did you decide to go?

A. After I got over being sick.

Q. Was it part of the nation-wide talk about Mrs. Sherrer as to just where she had gone?

A. No.

Q. And did you know?

A. No.

Q. But you did know she had gone to Florida?

A. Yes.

Q. When you got down there, did you look her up?

Mr. Myers: I pray Your Honor's judgment.

The Court: I will hear the answer.

Mr. Myers: Exception.

A. No.

[fol. 48] Q. Your meeting with her on some street in St. Petersburg was purely by accident, is that so?

A. Yes.

Q. You visited at her house frequently after that, didn't you?

A. Once in a while.

Q. About how often?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Sometimes once a week.

Q. Did that frequency prevail right through from the time you met her until you got married to her?

A. I didn't see her every week. I was in Tampa working and had to work overtime sometimes. I wasn't paying any attention anyhow; I just knew nobody down there and saw no harm in making a visit.

Q. But you say you saw her about once a week all the time?

A. No, not once every week.

Q. Were there times when you didn't see her for as much as a whole month?

A. Yes.

Q. At times you didn't see her for as much as two or three months?

A. I couldn't say.

Q. There might have been?

A. There might have been.

Q. During the period from August 1st to the end of November, there might be a two or three month interval during which you didn't see her at all, isn't that so?

A. No.

Q. How frequently did you see her during that time?

A. Once or twice, maybe three times.

Q. Maybe three times during that whole period?

A. Yes.

Q. I don't want any misunderstanding about that. You now say from August 1st to the end of November, 1944, you may have seen her only two or three times?

A. Yes. I don't believe I saw her more than that.

[fol. 49]. Q. I now ask you about how many times you think you saw her from the middle of April to August 1st?

A. I don't just remember how many times I saw her.

Q. Did you see her as many as ten times?

A. It is possible. I don't know.

Q. You are not able to give us any idea whatsoever how many times you saw her from the middle of April to the 1st of August?

A. No.

Mr. Cain: That's all.

#### Rebuttal.

By Mr. Cain:

EDWARD C. SHERER

Q. Mr. Sherrer, were you able to give us any information—from your own knowledge—as to how often your wife saw Mr. Phelps during February and March, 1944?

A. Yes.

Q. What can you tell us with reference to that—from your own knowledge?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I made a trip to New Jersey and when I came back from New Jersey, I parked the car at the bottom of the hill. The house was dark, and all was quiet. I came up the hill and then the lights were on in the house and when I went in, they were standing six to eight feet apart, both very nervous. He said he had just telephoned.

Q. When was that?

A. That was between January 19th and 23rd, 1944.

Q. Did you see them together after that and before she left?

A. Yes, but not alone.

[fol. 50] Q. How many times did you see them together after that?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. When he came in the house to telephone.

Q. How often was that?

A. Twice a week.

Q. Did they talk together at those times?

A. No.

Q. Did your wife go to Great Barrington once a week and stay all day and all evening during the period of February and March, 1944?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Yes.

Q. And did she discuss those trips with you in the presence of Beverly?

A. I wouldn't say yes to that. I very seldom discussed anything in front of the child.

Q. So that any discussion you had with your wife was just alone with her?

A. Yes.

Q. What day of the week was that?

A. Tuesday.

Q. Tell us what you observed with reference to Henry

Phelps on Tuesday evenings after your wife's return from Great Barrington?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. She returned about eleven o'clock most every night, and he would come along about quarter or twenty minutes after eleven. There were no exceptions.

Q. Do you have any further information—to your own knowledge—as to whether they were together those days?

Mr. Myers: Objection.

[fol. 51] The Court: Objection over-ruled.

A. Yes. My own observation of her reaction to me when she went to bed.

Q. Give us your observation of her attitude towards you on Tuesday nights.

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Absolutely cool and almost insolent.

Q. Was this attitude toward you on Tuesday nights, to which you have alluded, different or the same as on other nights?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Different.

Q. Do you know when Phelps left Monterey?

A. I believe he visited me on a Sunday following their departure. I think he left Monday, about a week later. I didn't see him at the train.

Q. What day was it?

A. Monday, the 10th, I would say.

Q. When did you get to Florida?

A. November 9th.

Q. Did you observe contraceptives around the house while she was still there?

Mr. Myers: Objection.

The Court: Sustained.

Mr. Cain: Exception.

Mr. Cain: I offer to prove that the answer to the question is yes.

Q. Did you observe whether the contraceptives were still in the house after she left?

Mr. Myers: Objection.

The Court: Sustained.

Mr. Cain: I offer to prove that his answer would be that he observed that the contraceptives were gone.

[fol. 52] Did she use contraceptives with you?

Mr. Myers: Objection.

The Court: Sustained.

Mr. Cain: I offer to prove the answer would be that she did not.

Q. After reaching Florida, how long was it before the divorce hearing was held?

A. Five days after I arrived—from the 9th to the 14th.

Q. Did you discuss the matter with your attorney?

A. On Friday after I arrived, and on Monday.

Q. Did you accompany him to the divorce hearing?

A. No, I arrived alone and met him at the Judge's chambers.

Q. Were you present when Mrs. Sherrer testified?

A. No.

Q. Do you know whether she testified in the Court room or in the Judge's chamber?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I think in the Judge's chamber.

Q. Where were you when she was testifying?

A. In one of the anterooms.

Q. Was your lawyer in the place where she was testifying?

A. I think so, because he wasn't with me.

Q. When did you next see her?

A. When I went before the Judge, and he took what little testimony I had to offer.

Q. Were you in the presence of the Judge during that hearing at any time except when you yourself were testifying?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. No, sir.

Q. You brought the children back with you?

A. Yes, sir.

[fol. 53] Q. When?

A. The 19th of November.

Q. Have you knowledge of your own with reference to the health of Mr. Phelps, Senior, during the time Henry Phelps was in Florida?

A. He was in pretty bad shape is all I know.

Q. Did you know?

A. I saw him going up and down the road, and I went up to visit him.

Q. When was it you visited him?

A. About a week after his son went away.

Q. Did you visit him after that?

A. No, I did not.

Q. Did he stay in Monterey or move elsewhere?

A. He moved elsewhere; I heard Westfield.

Q. Did you telephone your wife sometime in April?

A. I did.

Q. Did you send her a telegram after that?

A. A couple of weeks after that.

Q. Did you send her a telegram saying you might go down there?

A. I did.

Q. Did you write to your wife after April?

A. All during April. I don't believe I did after April 30th.

Q. Did she write you after April 30th?

A. I don't believe so—to the best of my knowledge.

Q. Aside from one telephone call and a telegram, did you communicate with her in any way?

A. No, sir, not directly.

Mr. Cain: That's all.

Mr. MYERS

Q. Did you phone her at one time you would have the troopers after her?

A. I phoned her.

Q. When you were in the presence of the Judge in the Florida court (you, yourself) Mrs. Sherrer was also present?

A. I believe so, yes.

After being duly examined as to competency to testify, the child, Beverly Jean, was sworn and gave testimony as follows:

[fol. 54] Direct examination.

By Mr. Cain:

BEVERLY JEAN SHERER

Q. What is your full name?

A. Beverly Jean Sherrer.

Q. Did you and your sister, Gail, go to Florida with your mother last year?

A. Yes.

Q. Did your mother tell you how long you were going to stay?

A. Yes.

Q. What did she say?

A. She said we were going to stay a month.

Q. Where were you when she told you that?

A. At home.

Q. Monterey?

A. Yes.

Q. Do you know what city you went to when you went to Florida?

A. Tampa.

Q. Do you know what city you went to after that?

A. St. Petersburg.

Q. You lived in different houses there?

A. Yes.

Q. While you were down there, did you talk with your mother about coming back?

A. Yes.

Q. What did your mother say?

A. She said she was coming back in a month at first.

Q. Then later did you talk with her about it again?

A. Yes.

Q. What did she say then?

A. I never got anything definite.

Q. Did you see Mr. Phelps while you were down there?

A. Yes.

Q. Did you used to see Mr. Phelps before you left Monterey?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I saw him at our house.

Q. Can you tell us how often?

A. I don't remember.

Q. Do you remember how soon it was after you got to Florida when you first saw Mr. Phelps?

[fol. 55] Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. About a week.

Q. Where was that?

A. At the apartment where we were living at first.

Q. Did you see him after that?

A. Yes.

Q. About how often?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. About once a week.

Q. Do you remember the different months—May, June, July, August—where you were living during those months?

A. Yes.

Q. When summer came, how often did Mr. Phelps come to the house?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. In the first part about once a week and then more often.

Q. How often did he come later?

A. Five times a week.

Q. Do you remember when your father got down there?

A. About.

Q. Did you see your father down there in St. Petersburg?

A. Yes.

Q. Just before your father came down, how often did Mr. Phelps come to your house?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Quite a bit.

[fol. 56] Q. Can you tell us how many times a week?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Maybe four or five times.

Q. When Mr. Phelps came during that time, how long did he stay?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. I can't remember.

Q. Do you remember whether he came mornings, afternoons, or evenings?

A. In the afternoon and evening—late afternoon.

Q. Did he have supper there?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Sometimes.

Mr. Cain: That's all.

Cross-examination.

By Mr. Myers:

Q. What did you mean when you said you never got anything definite from your mother?

A. She never said when we were coming back.

Q. Were you trying to get something definite?

A. Yes.

Q. Were you examining her because your father asked you to?

A. No.

[fol. 57] Q. Why were you examining her?

A. Because I wanted to get back and see my friends.

Q. You haven't any idea at all how long Mr. Phelps stayed at any time he came there while you were in Florida?

A. No.

Q. You haven't any definite memory as to when he came during any period of time?

A. No.

Mr. Myers: That's all.

Redirect-examination.

By Mr. Cain:

Q. What time did you go to bed?

A. Between eight and nine.

Q. When Mr. Phelps came, was he there when you went to bed?

Mr. Myers: Objection.

The Court: Objection over-ruled.

Mr. Myers: Exception.

A. Sometimes.

Q. After you got back to Monterey in the winter, did you get a letter from your mother?

A. Yes.

Q. Is this the letter?

A. Yes.

Petitioner's Exhibit #7—Letter from Respondent to her children, dated January 7, 1945.

Q. Do you remember how soon you went to school after you got down there?

A. Two and a half to three weeks.

Q. Are you sure of that, Beverly?

A. I am not quite sure, but somewhere around there.

Mr. Cain: That's all.

[fol. 58] Recross-examination.

By Mr. Myers:

Q. Where is Gail now, your sister?

A. She is with my mother.

Q. Where you are staying is with Mr. Kinne, Miss Kinne, and your father?

A. Yes.

Mr. Myers: That's all.

It is stipulated by counsel that the spelling of the names of the parties in all the pleadings should be Scherrer instead of Sherrer.

Stenographer's certificate omitted in printing.

[fol. 59] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

MOTION TO DISPENSE WITH REPRODUCING EXHIBITS

Filed November 7, 1945

Now comes Marguerite E. Phelps, herein described as Margaret E. Sherrer, appellant, and says that the reproduction of the exhibits in the record herein upon appeal to the Supreme Judicial Court would entail burdensome and unwarranted expense.

Wherefore, she moves that certificate be issued to that effect so that said exhibits need not be reproduced but that the exhibits may be presented to the Full Court at the time of argument or of submission on briefs.

Marguerite E. Phelps, By F. M. Myers, Her Attorney.

[File endorsement omitted.]

[fol. 60] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

REPORT OF MATERIAL FACTS—Filed November 8, 1945

The petitioner and respondent were married March 15, 1930, at North Bergen, New Jersey, and took up their residence in Monterey, Massachusetts, in 1932, where they lived together as husband and wife until April 3, 1944.

Two children were born to them, Gail Fairfield, now 6 1/2 years old, and Beverly Jean, now 11 1/2 years old.

The husband, wife and two children comprised the entire household.

The respondent's mother, sometime prior to March, 1941, had been committed to a mental hospital in Northampton, and the petitioner thereafter made occasional references to this fact. Such references were dis-

turbing to the respondent and resulted in friction between her and the petitioner. She became nervous and upset, and a sinus condition from which she suffered became worse.

In March, 1944, the respondent told the petitioner that she wished to take a trip to Florida as she needed a rest. She said she wished to take the two children with her, and would be gone about a month. The petitioner consented to her taking this trip and gave her the necessary funds. She and the children left Monterey April 3, 1944, and arrived at Tampa, Florida, the following day. She had told the two children as well as her husband that she [fol. 61] intended to return to Monterey in a month, and had told some of her friends in Monterey the same thing. All she took by way of baggage was a suitcase and a small bag. She had a trunk but did not take it.

The respondent and her two children stayed in Tampa overnight and the next day went to St. Petersburg where she hired an apartment which they occupied for three weeks. Thereafter they moved to a cottage in St. Petersburg which they rented furnished, and about three months later moved to another furnished cottage in the same city, which they continued to occupy as long as they remained in Florida.

About a week after the respondent left Monterey one Henry A. Phelps of Monterey, an acquaintance of both parties, left that town for St. Petersburg. He knew the respondent had gone there, as it was common talk around town. He had been very friendly with the respondent in Monterey and the petitioner suspected that she was having a clandestine affair with him. He used to come to the petitioner's house frequently to use the telephone. For about two months before the respondent went to Florida she used to go to the neighboring town of Great Barrington every Tuesday and stay all day and all evening. The petitioner observed that she would get home around eleven o'clock at night, and fifteen or twenty minutes after she got home Mr. Phelps, who lived a short distance above them, would arrive home from the direction of Great Barrington. The attitude of the respondent toward the petitioner immediately following these weekly trips to Great Barrington was cool and indifferent.

In January, about ten weeks before the start of the Florida trip, the petitioner arrived home from a trip to New Jersey one night and parked his car some distance from his house, which was dark. Upon arriving at the house the lights went on and he found his wife and Mr. Phelps there. Both appeared very nervous.

Almost immediately upon arriving at St. Petersburg on April 14th Mr. Phelps met the respondent. Thereafter [fol. 62] he saw her frequently, first at the apartment and later at the cottage which she and her children occupied. At first he called on the respondent about once a week at her home, but later these visits increased until he was coming about five times a week. Sometimes he came in the afternoon and sometimes in the evening, and often came for supper. Sometimes he remained after the children went to bed.

The first intimation that the petitioner had that the respondent was not coming back to Monterey was when she wrote him a letter postmarked April 20th, returning the money he had sent her for train fare for herself and the children and informing him that she did not care to come back and live with him.

On July 6th the respondent consulted an attorney in Florida about bringing divorce proceedings. The bill of complaint was drawn up that day and signed by her, the respondent (meaning the libellant in the divorce action) alleging that she was at that time a bona fide legal resident of the State of Florida and had been such for the previous ninety days. The divorce was brought on the grounds of extreme cruelty.

The petitioner (meaning the libellee in the divorce action) received notice of the libel by mail on or about July 10th. Thereupon he retained counsel in Florida to represent him, and in November went to Florida to appear at the divorce hearing. Testimony in the case was taken on November 14th. Mr. Scherer was not present when his wife testified, though his counsel was. Mr. Scherer was in a side room. Before Mrs. Scherer was called as a witness her attorney read into the record a stipulation, subject to the approval of the court, whereby custody of the two children would be in their father during the school year, and in their mother during the

summer vacation. This was agreed to by counsel for Mr. Scherrer. Mrs. Scherrer then gave her testimony and was not cross-examined. Thereafter Mr. Scherrer was brought into the courtroom and questioned by the court as to his ability to look after the children during the [fol. 63] school year, and upon satisfying the Court in that respect the hearing closed, except for the putting in evidence of a deposition of a witness for the purpose of corroborating Mrs. Scherrer's testimony. This deposition was filed on November 29th and made part of the record.

On November 19th Mr. Scherrer returned to Monterey with the children, although the final decree in the divorce action was not entered until November 29th.

Mrs. Scherrer went through a marriage ceremony with Mr. Phelps December 1st, two days after the divorce decree was entered. She and Mr. Phelps at once took up their residence in the cottage which she had been occupying. The respondent was at that time employed as a waitress in a St. Petersburg restaurant and Mr. Phelps was working in a lumber yard. They remained there until shortly after February 1st, 1945, when they left Florida and came north, first going to Westfield, Massachusetts, and thereafter to Monterey, arriving in Monterey on or about February 5th.

They went immediately to the house where she and the petitioner had been living at the time of her departure for Florida. The petitioner had not been living there since a few weeks after she left Monterey, he having gone to live at the home of Sheriff Kinne in Monterey village.

Within a few days after they returned to Monterey Mr. Phelps was served with a writ in a suit for alienation of affections brought by Mr. Scherrer and returnable to the Berkshire County Superior Court April 2, 1945. That case is now pending.

Mr. Phelps' father was in ill health when he left for Florida in April, 1944, but was able to be up and around. Shortly after Mr. Phelps left for Florida his father went to live in Great Barrington, and thereafter he lived there part of the time and part of the time with a relative in Westfield. There was no evidence that he

ever came back to Monterey to live. The condition of his health became worse shortly before his son and the respondent left Florida for Massachusetts.

[fol. 64] The respondent, in going to Florida, did not intend to make it her permanent home, but went there with the intention of meeting Mr. Phelps, obtaining a divorce from her husband, and then marrying Mr. Phelps. Her ultimate purpose at all times was to return to Massachusetts after accomplishing these things. The question of her domicile was not made an issue at the divorce hearing. The divorce, in effect, was uncontested. The respondent agreed before the case was heard that the petitioner could have custody of the children during the entire school year, and the petitioner then refrained from contesting the divorce.

F. Anthony Hanlon, Judge of Probate Court.

[File endorsement omitted.]

[fol. 65] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

CERTIFICATE OF COURT REGARDING PRESENTATION OF  
EXHIBITS TO FULL COURT

I hereby certify that the reproduction of certain exhibits in the above entitled matter in the record would entail burdensome and unwarranted expense and would be impracticable. Said exhibits are as follows:

Petitioner's Exhibit 1. Letter from respondent to petitioner postmarked April 6, 1944.

Petitioner's Exhibit 2. Letter from respondent to petitioner postmarked April 9, 1944.

Petitioner's Exhibit 3. Letter from respondent to petitioner postmarked April 13, 1944.

Petitioner's Exhibit 4. Letter from respondent to petitioner postmarked April 18, 1944.

Petitioner's Exhibit 5. Letter from respondent to petitioner postmarked April 20, 1944.

Petitioner's Exhibit 6. Letter from respondent to petitioner postmarked April 28, 1944.

[fol. 66] Petitioner's Exhibit 7. Letter from respondent to her children postmarked January 9, 1945.

Respondent's Exhibit 1. Citation to appear before Florida Court in divorce proceedings.

Respondent's Exhibit 2. Photostatic copy of Florida divorce proceedings.

F. Anthony Hanlon, Judge of Probate Court.

[File endorsement omitted.]

[fol. 67] IN THE PROBATE COURT OF BERKSHIRE COUNTY

[Title omitted.]

STIPULATION AS TO CORRECT SPELLING OF NAMES OF PARTIES

—Filed May 31, 1946

Now come the parties in the above entitled action and stipulate as follows:

The petitioner, Edward C. Sherrer, is sometimes known as Edward C. Scherrer.

The respondent, Margaret E. Sherrer, is sometimes known as Margaret E. Scherrer, Marguerite E. Sherrer, Marguerite E. Scherrer, Margaret E. Phelps and Marguerite E. Phelps.

Petitioner, by his attorneys Cain, Chesney, Lewis & Capeless. Respondent, by her attorney F. M. Myers.

[File endorsement omitted.]

[fol. 68] IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

EDWARD C. SHERMER

vs.

MARGARET E. SHERMER

RESCRIPT—November 4, 1946

Pending in the Probate Court for the County of Berkshire

Ordered, that the register of probate and insolvency in said county make the following entry under said case in the docket of said court; viz.,—

Decree affirmed.

By the Court, Walter F. Frederick, Clerk.  
November 4, 1946.

[fol. 69] IN THE SUPREME JUDICIAL COURT OF  
MASSACHUSETTS

OPINION—November 4, 1946

WILKINS, J. These are two petitions in the Probate Court of Berkshire County, one for a decree that the respondent has deserted the petitioner and that the petitioner is living apart from the respondent for justifiable cause, and the other for the custody of two minor children. From decrees in favor of the petitioner the respondent appeals. The testimony is reported, and the judge in each case made a report of the material facts found by him. G. L. (Ter. Ed.) c. 215, § 11. *Rubinstein v. Rubinstein*, 319 Mass. 568, 569. (Mass. Adv. Sh. [1946] 639, 640.) *Coe v. Coe*, Mass. Adv. Sh. (1946) 1127, 1128.

1. We first consider an appeal of the petitioner from the denial of his motion to dismiss the respondent's appeal from the decree that the respondent has deserted the petitioner and that the petitioner is living apart from the respondent for justifiable cause. The motion was based upon an alleged failure to comply with G. L. (Ter. Ed.) c. 231, § 135, as amended, which requires that "the party having the obligation to cause the necessary papers \*\*\* to be prepared shall give to the \*\*\* register \*\*\* within ten days after the case becomes ripe for final preparation and printing of the record for the full court, an order in writing for the preparation of such papers and copies of papers for transmission to the full court of the supreme judicial court." The decree was dated October 8, 1945. The respondent made no request of the judge to report the material facts, but the petitioner made such a request on October 11. On October 23 the respondent appealed and filed a transcript of the evidence. On the same day the register received from the respondent a letter containing the following: "Please prepare for transmission to the Supreme Judicial Court all papers required to present appeal of respondent in the matter of [fol. 70] Edward C. Sherrer vs. Margaret E. Sherrer." This was "an order in writing" within the meaning of G. L. (Ter. Ed.) c. 231, § 135. *Bass River Savings Bank v. Nickerson*, 302 Mass. 235, 237-238. On November 8 the judge filed a report of the material facts found by him.

As the decree was entirely in favor of the petitioner, and he was not aggrieved thereby, his request for a report of the material facts was not by a "party entitled to appeal" under G. L. (Ter. Ed.) c. 215, § 11. *Donovan v. Donovan*, 223 Mass. 6, 7, and cases cited. *Olsen v. Olsen*, 294 Mass. 507, 509-510. *Walsh v. District Court of Springfield*, 297 Mass. 472, 474. *Ballard v. Maguire*, 317 Mass. 130. See *Murphy v. Donovan*, 295 Mass. 311, 312, 313. The report of material facts in the case at bar must be taken to have been voluntary. It might never have been made. The mere possibility of its being made could not have availed the respondent as a reason for delay in ordering the preparation of the papers for transmission to this court. Indeed the petitioner does not contend that the order was not timely when given. His contention is rather that the case ceased to be "ripe for final preparation and printing of the record for the full court" (*Moskow v. Murphy*, 310 Mass. 249), that the order was vitiated by the subsequent filing of the report of material facts, which was a necessary part of the record on appeal (*Boston Safe Deposit & Trust Co. v. Wickham*, 254 Mass. 471, 473; *Martell v. Moffatt*, 276 Mass. 174, 177-178; *MacNevin v. MacNevin*, 319 Mass. 719, 721, Mass. Adv. Sh. [1946] 795, 796), and that, therefore, the respondent should have given another order for the preparation of the record within ten days after the filing of the report. We do not sustain this contention. The case having once become "ripe for final preparation and printing of the record" did not thereafter lose its ripeness in this respect by the making of a voluntary report of the material facts, even though [fol. 71] such report had to be included in the record for this court. Any other conclusion would "promote confusion and uncertainty of practice" (*Hubbard v. Southbridge National Bank*, 297 Mass. 17, 20), and might result in nullifying a printed record at an indefinite future date.<sup>1</sup>

<sup>1</sup> In the Probate Court there is no time limit for the filing of a report of material facts even when made under the statute. See, however, as to the Supreme Judicial Court and the Superior Court, G. L. (Ter. Ed.) c. 214, § 23, as appearing in St. 1945, c. 394, § 1.

By way of precaution we state that we should not be understood as intimating that the requirement that the order be given "within ten days after the case becomes ripe for final preparation and printing of the record for the full court" would preclude the giving of the order before the ten days started to run. See *MacNevin v. MacNevin*, 319 Mass. 719; (Mass. Adv. Sh. [1946] 795). See also *Atherton v. Corliss*, 101 Mass. 40; *Young v. The Orpheus*, 119 Mass. 179, 185; *Reardon v. Cummings*, 197 Mass. 128; *Bay State Dredging & Contracting Co. v. W. H. Ellis & Son Co.*, 235 Mass. 263, 267-268; *Carey v. Casey*, 245 Mass. 12; *Reagan v. Mayor of Fall River*, 260 Mass. 529, 531; *Nevins v. Board of Public Welfare of Everett*, 301 Mass. 502, 503. Compare *Levine v. Finkelstein*, 312 Mass. 483, 485.

There was no error in the denial of the petitioner's motion to dismiss the appeal.

2. We now consider the merits of the petition representing that the petitioner wishes to be enabled to convey his real estate as though he were sole, and alleging that the respondent has deserted the petitioner and that the petitioner is living apart from the respondent for justifiable cause. G. L. (Ter. Ed.) c. 209, § 36. We summarize facts as found by the judge or by ourselves. *Lowell Bar* [fol. 72] *Association v. Loeb*, 315 Mass. 176, 178. The parties were married in 1930, in New Jersey, and from 1932 until April 3, 1944, lived together at Monterey in this Commonwealth. On the last mentioned date the respondent, stating that she was leaving for a month's rest, took their two minor daughters with the petitioner's consent to St. Petersburg, Florida. She arrived in Florida April 4. For three weeks she and the children occupied a rented apartment. Thereafter they successively occupied two rented furnished cottages in that city. About April 14, 1944, Henry A. Phelps of Monterey, who for some time had been an intimate friend of the respondent and an acquaintance of the petitioner, and who knew that the respondent had gone to Florida, went to St. Petersburg, where he saw the respondent very frequently. On April 20 the respondent wrote the petitioner, stating that she did not care to go back to live with him, and returning travel money he had sent her. On July 6 she con-

sulted an attorney in Florida, and on the same day signed a bill of complaint for divorce on the ground of extreme cruelty, which alleged that she had been a bona fide resident of Florida for ninety days. The bill of complaint was filed in the Circuit Court of the Sixth Judicial Circuit of Florida in and for Pinellas County. About July 10 the petitioner by mail received formal "notice to appear" by August 7. He retained Florida counsel, who entered a general appearance, and filed an answer, which, among other things, denied the allegations as to residence. Later the petitioner went to Florida, arriving November 9. At that time the respondent was employed as a waitress in a restaurant in St. Petersburg, and Phelps worked there in a lumber yard. On November 14, 1944, there was a hearing in the divorce proceeding, during which the petitioner's attorney was present, but the petitioner remained "in a side room." The respondent's attorney read into the record a stipulation of the parties, which, subject to the approval of the court, provided [fol. 73] that the custody of the children should be in the petitioner during the school term of each year and in the respondent the remainder of each year. The respondent testified and was not cross-examined. The petitioner then entered the courtroom, and was questioned by the judge as to his ability to look after the children, and, when he had satisfied the judge in that respect, the hearing closed except for the deposition of a witness in corroboration of the respondent. On November 19 the petitioner returned to Monterey with the children. On November 29 the deposition was filed, and a final decree was entered awarding the respondent a divorce and awarding custody as stipulated. On December 1 the respondent and Phelps went through a marriage ceremony in Florida. They thereafter resided in the cottage which she had been occupying. Shortly after February 1, 1945, they came to Massachusetts, going first to Westfield, where Phelps' father was ill, and then to Monterey, where they arrived about February 5. There they occupied the house where the respondent and the petitioner had been living at the time of her departure for Florida. The petitioner was living with another family in Monterey. About February 12, 1945, Phelps was served with

a summons in an action brought by the petitioner in the Superior Court, Berkshire County, for alienation of the affections of the respondent.

The judge found: "The respondent, in going to Florida, did not intend to make it her permanent home, but went there with the intention of meeting Mr. Phelps, obtaining a divorce from her husband, and then marrying Mr. Phelps. Her ultimate purpose at all times was to return to Massachusetts after accomplishing these things. The question of her domicile was not made an issue at the divorce hearing. The divorce, in effect, was uncontested. The respondent agreed before the case was heard that the petitioner could have custody of the [fol. 74] children during the entire school year, and the petitioner then refrained from contesting the divorce." The respondent contends that these findings were plainly wrong. It is urged that the findings as to her intent in going to Florida "cannot stand in the light of the evidence." There was testimony tending to show, and the judge found, that the respondent's mother had been committed to a mental hospital; that the petitioner made occasional references to this fact, which were disturbing to the respondent and resulted in friction; that she became nervous and upset; and that a sinus condition from which she suffered became worse. The petitioner testified, "She acted in such a way that I thought telling her about her mother's condition it might straighten her out and help her to mend her ways with the children." The respondent testified that the petitioner told her that she had "a crazy look in \* \* \* [her] eyes just like \* \* \* [her] mother" and that she would be in the same institution as her mother within two years; that her fears about being committed had a bearing upon her decision as to going to Florida; that she intended to stay in Florida when she left; that her statements to the contrary made to her husband, to her daughter, and to friends were falsehoods; that she went to Florida on her doctor's advice; that she could not "stand it any longer"; that she could have gotten a divorce here, but "had to get away"; that her elder daughter attended school in Florida; that at the time of her marriage she intended to make her home permanently in Florida; that she considered her position as a waitress in a restaurant "a

permanent job"; that she and Phelps returned to Massachusetts as a result of a letter to him advising of the serious illness of his father; that they remained in Massachusetts because of the action for alienation of affections; and that they kept the cottage in Florida for a month after February 5, 1945. The judge was not [fol. 75], required to accept the respondent's testimony that her statements that she was leaving Massachusetts temporarily had been falsehoods. This is the usual situation of conflict in testimony. Nor were the findings open to the objection that mere disbelief of testimony does not constitute proof of facts to the contrary. See *Zarillo v. Stone*, 317 Mass. 510, 512. A requirement for instituting divorce proceedings in Florida is that "the complainant must have resided" there for ninety days. Fla. Sts. (1941) § 65.02. This means domicil and not mere residence. *Wade v. Wade*, 93 Fla. 1004, 1007. See *Andrews v. Andrews*, 176 Mass. 92, 93-94; *Cohen v. Cohen*, 319 Mass. 31, 34 (Mass. Adv. Sh. [1946] 41, 43); *Williams v. North Carolina*, 325 U. S. 226, 229. The bill of complaint was signed by the respondent within a few days after the expiration of the minimum residence requirement. The fact that a wife leaves her husband and goes into another State, and there applies for a divorce soon after she is able to do so, warrants the inference that she goes there for that purpose. *Lyon v. Lyon*, 2 Gray, 367. *Chase v. Chase*, 6 Gray, 157, 162. "In *Smith v. Smith*, 13 Gray, 209, the presumption arising from such a fact is said by Chief Justice Shaw to be 'violent, if not conclusive.' See also *Sewall v. Sewall*, 122 Mass. 156." *Dickinson v. Dickinson*, 167 Mass. 474, 477. The early application for divorce and other evidence as to her intention amply justified the judge's finding by implication that she was not domiciled in Florida. *Commonwealth v. Kendall*, 162 Mass. 221. *Williams v. North Carolina*, 325 U. S. 226, 236-237.

The next contention is that the Probate Court decree was a denial of full faith and credit to the Florida divorce decree. The respondent relies upon *Davis v. Davis*, 305 U. S. 32, a case which we have interpreted "as resting on the basis that the jurisdictional facts were actually litigated and determined to exist in the court granting the [fol. 76] divorce." *Cohen v. Cohen*, 319 Mass. 31, 35 (Mass. Adv. Sh. [1946] 41, 44). *Bowditch v. Bowditch*,

314 Mass. 410, 416. *Rubinstein v. Rubinstein*, 319 Mass. 568, 571 (Mass. Adv. Sh. [1946] 639, 642). *Coe v. Coe*, Mass. Adv. Sh. (1946) 1127, 1133. The allegation as to residence in the bill of complaint, which was denied in the answer, did not constitute an actual litigation of the jurisdictional facts. We do not think that a different result was required because there was testimony on this subject from witnesses called by the respondent or because the petitioner's counsel was present without participating in the examination of the witnesses. An examination of the record shows that the judge's finding that the divorce was uncontested was not plainly wrong. The ruling in *Davis v. Davis*, 305 U. S. 32, was based chiefly upon decisions in cases not involving the marital relation and in which the paramount rights of the State were not involved (page 42). Any extension of that ruling to comprehend the facts of the present case, which disclose nothing more than an agreement as to custody and a formal uncontested hearing, must come from the court which first pronounced that doctrine. In our opinion, to recognize the Florida decree as controlling in spite of facts which show that neither party was domiciled in that State would allow the parties, who are domiciled in this Commonwealth, to agree upon and achieve an undoing of their marriage by a specious indirection. We think that the judge's finding is not precluded by § 1 of art. 4 of the Constitution of the United States. *Andrews v. Andrews*, 188 U. S. 14, 41. *Williams v. North Carolina*, 325 U. S. 226, 238. *Esenwein v. Commonwealth*, 325 U. S. 279, 280-281.

3. There remains for consideration the decree respecting custody of the daughters, Beverly, aged eleven, and Gail, aged six. The court had jurisdiction to enter the decree under G. L. (Ter. Ed. ) c. 209, § 37. *Gallup v. Gallup*, 271 Mass. 252, 257. *Bergeron v. Bergeron*, 287 Mass. [fol. 77] 524, 530. The paramount issue is the welfare of the children. *Grandell v. Short*, 317 Mass. 605, 608. *Erickson v. Raspberry*, Mass. Adv. Sh. (1946) 1169, 1171, and cases cited.

The judge made a separate report of the material facts found by him in this matter. We briefly state his findings other than those relating to the Florida divorce. The children and the petitioner lived with a family in a house in Monterey until the latter part of June. At that time

the respondent went to that house during the absence of the petitioner, and forcibly removed Gail to the house in Monterey where Phelps and the respondent were living. Gail remained there in the actual custody of the respondent until about two weeks before the hearing (which took place November 7, 1945), when the respondent and Gail disappeared. Their whereabouts at the time of the hearing on the petition for custody were unknown. The judge also found in effect that the environment for the children with the father was proper, and that the house where Phelps and the respondent lived was an improper place for Gail to live. As to this factor the judge found, "The divorce having been found invalid, the respondent and Henry Phelps are not man and wife, and the consequent public scandal of their living under the same roof provides an atmosphere of immorality which is unhealthy for Gail." The findings were not plainly wrong and must stand.

Decrees affirmed.

---

[fol. 78] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 937

ORDER ALLOWING CERTIORARI—Filed March 3, 1947

The petition herein for a writ of certiorari to the Probate Court for the County of Berkshire, Commonwealth of Massachusetts, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9676)